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Re: *Piute Reservoir Carry Over Water Credit*

Dear Jared,

In the interest of achieving a correct and equitable resolution of the dispute between Piute Reservoir users ("Piute") and Sevier Bridge Reservoir users ("Sevier"), Piute submits this brief follow-up to its letter of July 11, 2014 and the DMADC letter of August 14, 2014. It is limited to specific items requiring clarification.

1. **Water over Vermillion Dam.** The present dispute arises out of the fact that in 2012 and 2013, the Upper River Commissioner allowed more water to pass Vermillion Dam than was required to satisfy established priorities. The status of water allowed to pass Vermillion Dam is specifically governed by the following language from page 194 of the Cox Decree:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any and all water that passes said Vermillion Dam having been yielded by the river in the upper zone, that is, above Vermillion Dam, from January 1 to December 31, inclusive, in each and every year, is hereby decreed to and allocated to the Sevier Bridge Reservoir and the said Piute Reservoir under the terms and provisions of this decree.

2. **Sevier's effort to disqualify Piute.** Notwithstanding this patently clear allocation, Sevier would disqualify Piute's participation and claim the water for itself. Sevier places full reliance relies on the *Hoyt* ruling affirmed by the Utah Supreme Court. Unlike the current dispute, the *Hoyt* case involved water that had been released by the River Commissioner "at the express orders and direction of Piute." See *Watson v. Desert Irrigation Co.*, 169 P2d. 793, 799 (Utah 1946).

User control was the distinguishing characteristic. The Supreme Court was fully supportive of Piute receiving credit arising from mistakes of the River Commissioner, but not supportive of storage in Sevier arising from Piute's "*own volition.*" (See language quoted in paragraph 8 of Piute's letter of July 11, 2014, and in footnote #3 of DMADC's letter of August 14, 2014. [1]

3. **Neither Piute nor Sevier has a "storage right" in the other reservoir created of its "own volition."** Sevier water is frequently stored in Piute. Less frequently, Piute's water is stored in Sevier. But these arise from the management of the river by the River Commissioners and not from the directives of the Upper and Lower users. The 1938 Agreement greatly increased the flexibility of managing the river as a collective whole. The ultimate tool to ensure equity is the opportunity to balance the accounts in the succeeding year. Reliance upon this tool has been common practice for scores of years. In short, it allows the system to work.

4. **The first water used.** It has long been "a given" that the first water used during any year is the "holdover water" from the prior year. That is what happened here, but the bookkeeping entries cannot be finalized until receipt of the state engineer's directive to the two River Commissioners. Once the ruling in this dispute is finalized, the credit computations are simple and will be reflected in the records. Sevier's claim that Piute has waived its claim from non-use is opportunistic and without merit.

5. **Piute's concern regarding exactitude and rigidity**. Sevier misses the point on this subject. The 1938 Agreement was designed to allow early and ongoing releases with assurance of credit during the succeeding year for mistakes made. The agreement represents a great step forward in the management of the river, but it is compromised if the "releases" are generously employed, and the "credits" are narrowly extended. That is Piute's impression of Sevier's desire for a windfall at Piute's expense. It is in this context that Piute is compelled to favor a cautious approach.

6. **Enhanced technology**. Sevier advances the argument that advanced technology has rendered possible the River Commissioners "monitoring" the entire river system from their homes or offices. Such is agreed, but monitoring is different than projecting. The advanced technology is an enormous leap forward in keeping track of "what has happened." But, the River Commissioners must still make projections of "what will happen." They retain the difficult task of making decisions based on these projections. Most notably, the accretions to the river between Piute Dam and Vermillion Dam remain as "fluid" as they have ever been. The need for the flexibility built into the 1938 Agreement remains fully

[1] The language of any judicial opinion must be read in the context of its employment. As stated by the authors Corpus Juris Secundum: "It is well settled that a judicial opinion must be construed with reference to the facts on which it is based, the language used must be held as referring to the particular case, and read in the light of the circumstances under which it is used, and of the issues or questions presented." 21 C.J.S., §175 Courts, at page 211.

applicable. The same may be said of the need for a "regulating stream." Sevier treats this as a moot topic. That position disregards reality. As previously opined by Lower River Commissioner, W. Roger Walker, and Consulting Engineer, Lynn R. Walker, "*The regulating stream was . . . intended as a . . . device to compensate for the deviations in flow beyond the ability to determine through measurement or managed through careful flow regulation.*" See the full language quoted and citation in paragraph 11 of Piute's letter of July 11, 2014.

7. **The Hoyt Decree and Paragraphs #2.** The Hoyt Decree speaks of two areas of potential miscalculation by the River Commissioner or Commissioners – one relates to excessive releases due to miscalculating of Sevier's entitlement under the general adjudication decree, and the other, miscalculations regarding accretion to the river between Piute Dam and Vermillion Dam. The tasks are much larger than first appears. A determination of Sevier's entitlement becomes a *defacto* determination of Piute's entitlement. Moreover, the decisions to release water from Piute are ongoing from January 1 to October 1, of each year. They involve a multiplicity of variables and are the product of projections of *what is likely to occur* both above Piute Dam and between that dam and Vermillion Dam. [2] Any suggestion that this is simple, or can be accomplished and forgotten, disregards the necessity of ongoing adjustment to achieve the decreed balance. Because released water can never be called back, the two-year management approach became an absolute necessity. Piute respectfully submits that what happened in 2012 and 2013 fit within the parameters of the Hoyt Decree as affirmed by the Supreme Court.

8. **The relationship between Piute and the A to L Users.** To the extent that these issues are relevant, they have always existed and need not be a focus of the current dispute. It is the better part of discretion to resolve the current dispute before heading down another track that could take some time.

CONCLUSION

Sevier fails to make the case that Piute and the other upper river A to L users must suffer a loss and Sevier obtain a windfall from mistakes made by the Upper River Commissioner. It fails to establish any reason why the River Commissioner should be precluded from correcting the mistakes by allowing credit as contemplated by the 1938 Agreement. Sevier's only justification for obtaining a windfall stems from a narrow reading of the *Hoyt Decree,* in isolation, and not in harmony with the general adjudication decree and the 1938 Agreement. The *Hoyt Decree,* as affirmed, arose under a specific set of facts and firmly established that Piute does not own an "at pleasure" independent storage right in Sevier subject to its "own volition." At the same time, *Hoyt* specifically recognizes Piute's entitlement to credit arising from miscalculations of the River Commissioner(s) related to "releases" on "accretions." That is what happened in 2012 and 2013. Compromise of Piute's entitlement or the power of the River

[2] The Supreme Court justices appear to have been well aware of the breadth and difficulty of the projection process. See, e.g., the discussion by Justice Wolfe at 169 P.2d 802.

Commissioners to right the wrong, would defeat the purposes of the 1938 Agreement and plunge the upper and lower river users into an ongoing and unproductive annual fight fraught with the exactitude and rigidity about which Piute has previously expressed concern.

Respectfully Submitted,

Kay L. McIff for
Piute Reservoir & Irrigation Company

KLM/gj
cc: Piute Irrigation Company